United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7045

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

APPEAL No. 75-7045

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P/S

ARROW NOVELTY COMPANY, INC.,

Plaintiff-Appellee,

v.

ENCO NATIONAL CORPORATION

Defendant-Appellant.

BRIEF FOR APPELLEE

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the trial court erred in finding that the New York City tray produced and marketed by defendant infringed upon plaintiff's Copyright No. Gp23714.
2. Whether the trial court erred in admitting into evidence plaintiff's New York City tray (PX-2) as being the subject of plaintiff's Copyright No. Gp23714.

3. Whether the trial court erred by permitting the statements made by defendant's former employee to plaintiff to be admitted into evidence.

STATEMENT OF THE CASE

On March 11, 1974, Arrow Novelty Company ("Arrow") filed a complaint in the district court for the Southern District of New York seeking injunctive relief and damages against Enco National Corporation ("Enco") for copyright infringement pursuant to 17 U.S.C. §§101 and 112. Both Arrow and Enco are New York corporations engaged in the manufacture and marketing of decorative and souvenir household items. This action involves a souvenir tray of brown pressed wood which depicts in relief on its surface specific scenes of New York City in a unique and original design. On February 29, 1960, Arrow filed its application for copyright registration of this tray with the United States Copyright Office and shortly thereafter copyright certificate No. Gp23714 was issued to cover the tray. (PX-1). Beginning on or about March 1, 1974, Enco infringed upon Arrow's copyright by producing and marketing a substantially similar tray of New York City.

After a trial to determine the issue of Enco's liability for copyright infringement on September 10 and 11, 1974, the district court, sitting without a jury, in an opinion dated October 30, 1974, found that Enco had infringed upon Arrow's copyright. Judgment permanently enjoining Enco from making or selling its tray of New York City was entered on December 20, 1974.

Arrow has marketed its souvenir tray of New York City in the metropolitan area since 1959. Arrow's tray is manufactured by Multi-Products, Inc. exclusively for Arrow. (24a) Since 1959, Arrow has never changed the mold of the tray and has not had any other tray of New York City. (24a, 69a). Arrow has marketed its tray to approximately 75 to 100 major retailers in the New York City area including city airports, and F.W. Woolworth and Company, and S.S. Kresge outlets. (25a, 26a). Arrow's employees have visited the company's retail customers regularly and have seen Enco products in the same stores. (27a).

Enco is a nationwide company with a sales force that covers the 48 continental states. Enco accounts for approximately 70 percent of New York City's scuvenir business as compared to Arrow's roughly five percent share of the market. (49a). However, during the years 1970 to 1973, Enco's sales in the New York City area declined. (89a, 90a, 91a).

Beginning the early months of 1974, Enco's New York City tray began appearing in various retail outlets that had previously stocked Arrow's tray. (30a).

Mr. Daniel Steinberg, Enco's Vice President of Sales, Mr. Herbert Bendell, Enco's overseas buyer, and Enco salesmen have visited over the last 12 years various retail store customers of Enco in New York City. These stores included F.W. Woolworth and Company and S. S. Kresge's. (79a, 81a, 82a, 131a). The purpose of such trips was to get a feeling for the market and while in these stores, Enco employees would regularly see souvenir items marketed by competitors. (82a, 131a, 132a). And Mr. Steinberg specifically testified on deposition:

"Q Now I'm only talking about New York areas, so let's forget about any other area.

"Do your salesmen or in particular, Mr. Weissfeld, have occasion from time to time to come to you and mention to you competing items in the stores handled by other companies, such as Arrow and Specialty Products?

"A Yes.

"Q So you have occasion from time to time with internal salesmen to discuss Arrow Novelty products?

"A No. We have had occasion to discuss competitive items. Very often we do not know the source, but we have occasion to discuss items that have made an impact on the local market." (51a, 52a).

Mr. Steinberg, however, maintained that he had never seen Arrow's New York City tray prior to this action. (77a, 82a)

Moreover, Mr. Bendell, who with Mr. Steinberg, went to Japan in 1973 to talk to the Matsudo Company there about producing a New York City bowl, had discussed the idea of a New York bowl with various salesmen and executives prior to his departure. (146a, 147a).

From 1962 or 1963 to August of 1973, Aaron Slabodsky had been Enco's sales representative for the New York City area.

Mr. Slabodsky, during the time he had been a salesman for Enco, contacted both Arrow and Multi-Products concerning Arrow's New York City bowl. Mr. Slabodsky had called Mr. Brown of Arrow in June or July, 1973 and had told him that he had been trying to get Multi Products to "knock off" Arrow's bowl for Enco, but that that no longer mattered, since Enco had gotten the bowl "knocked off" in Japan. (36a). Mr. Stevens of Multi-Products received a telephone call from Mr. Slabodsky in the Fall of 1971 when Mr. Slabodsky, after introducing himself as a representative of Enco, suggested that Multi-Products manufacture a New York City tray for Enco. Mr. Stevens declined, and Mr. Slabodsky said that Multi-Products was stupid to make such a tray for Arrow rather than Enco. (62a, 63a).

The trial court, after examining the two trays, concluded that the two trays bore a "remarkable similarity" to each other:

> "Each tray depicts scenes of New York City in raised sculptured form. The trays are identical in color, nearly identical in size and similar in shape. Three principal prominent landmarks -- Statue of Liberty, Empire State Building, Rockefeller Center -- are the same. The Statue of Liberty is in the center of both, while the positions of the other two landmarks are reversed. The lettered caption, 'New York City', is positioned in the top center of both trays and the letters are approximately the same size on both. The lettered words for the three prominent landmarks appear in the same place below each figure on a raised banner and the letters are approximately the same size on both trays. There is a harbor line running horizontally across the middle of both trays and there are boats in the harbor. The United Nations Building is positioned in the same place on both trays and the smaller less significant buildings on the left and right sides of each are similar. Both trays have slightly raised background clouds of very similar appearance, and both have a rose on the upper right side. There are on both trays grooved background lines projecting outward from the center with interspersed heavier accent lines. On the back of each tray is a hanging device with four small legs." (12a, 13a)

The court then found that the testimony of independent creation presented by Enco's witnesses was not credible. Rather, the considerable evidence in the record of Enco's access to Arrow's tray was a more rational explanation for the substantial similarity between the two trays. (15a).

The court, after hearing the testimony of Enco's Vice President of Sales, who appeared at the trial, of the company's independent creation of a New York City tray, found this explanation to be unbelievable and that it was inconceivable that Mr. Steinberg had never seen Arrow's tray. (16a). The court concluded:

> "The defendant's expression of the idea, i.e., the specific layout and design of the tray, bears such a remarkable resemblance to plaintiff's expression of the idea as to render the inference of copying inescapable and the contention of independent creation unbelievable." (17a).

Enco has brought this appeal alleging as grounds that the district court erred in its findings of fact and in admitting into evidence Arrow's New York City tray as well as the statements made by a former employee of Enco. Plaintiff respectfully submits that all of these issues presented for this Court's review are without merit.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FINDING INFRINGEMENT OF ARROW'S COPYRIGHT BY ENCO

The lower court's finding that Enco had infringed upon Arrow's copyright of its New York City tray was based on substantial evidence of similarities between the two trays and of access by Enco to the Arrow tray.

It is a well established principle of copyright law that it is not necessary to show actual copying of an item to prove infringement. Rather, infringement may be inferred from evidence of access and sufficient similarities. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Smith v. Little, Brown & Company, 360 F.2d 928 (2d Cir. 1966), and cases cited therein. Moreover, since the issues of copying and similarity sufficient to demonstrate misappropriation are both issues of fact, this Court has recognized that it is bound by the findings of the trial court, whether judge or jury, so long as its findings are supported by the evidence. This is true, regardless of whether this Court would have reached the same conclusion. Arnstein v. Porter, supra, at 469.

The evidence of similarity and access is more than sufficient in the instant case to support the findings of the trial court.

A. The Trial Court's Finding of Similarity Between The Two Trays is Supported by Substantial Evidence.

Enco's New York City tray is strikingly similar to the tray which Arrow has been marketing under copyright protection since 1960. As the trial court recognized, the two trays are nearly identical, having a similar size, shape, and color, and with a design, background, style and depiction of buildings that would confuse the ordinary observer into thinking the two trays were the same. Indeed, the only differences of any significance at all are the reversal in position of the Empire State Building and Rockefeller Center and the addition to Enco's tray of the World Trade Center, which was not yet built when Arrow's tray was created. It is difficult to believe that Enco could have independently designed a tray of New York City so strikingly similar to Arrow's tray. Moreover, such insubstantial differences that exist are not sufficient to show independent and original design on the part of Enco. Nikanov v. Simon & Schuster, Inc., 246 F.2d 501 (2d Cir. 1957).

This finding of striking similarity between two items by the trier of fact may be sufficient standing alone to justify the inference of copying and improper appropriation. Arnstein v. Porter, supra.

Similarity of items sufficient to constitute infringement is obviously less than identity, and will depend in individual cases on the uses for which an item is designed

and how closely observers will scrutinize it. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960). In that case, this Court, in affirming the district court's granting of a preliminary injunction against infringement of a copyright for a design printed on cloth, stated the relevant factors for determining whether infringement occurred when two designs were not identical, but had similar colors and symbols:

> "However, the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same. That is enough; and indeed, it is all that can be said, unless protection against infringement is to be denied because of variants irrelevant to the purpose for which the design is intended. 274 F.2d at 489.

See, also, Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021 (2d Cir. 1966).

In the instant case, the two trays present the ordinary observer with the almost identical familiar scenes of New York. The Enco tray is constructed, styled and arranged in such a manner that the observer looking for a tray of New York City would not see the minor dissimilarities and would regard the two trays as essentially the same. It is thus apparent that the finding of the trial court that the two trays are "clearly substantially similar" was not erroneous.

B. The Trial Court's Finding of Access is Supported By Substantial Evidence.

Enco's access to Arrow's New York City tray during the thirteen years the item was marketed prior to Enco's conceiving of the same item is direct evidence of Enco's copying of Arrow's tray.

As the record in this case showed, Arrow and Enco are competitors in the New York City wholesale souvenir market. Both companies sell to some of the same retail outlets, such as F. W. Woolworth and Company, and their salesmen visit these retail customers from time to time. Moreover, while Enco refused to admit that its salesmen specifically identified Arrow products in retail stores, witnesses conceded that competitors' products were noted and discussed.

Access has been defined as "a reasonable opportunity" for the infringer to have viewed the plaintiff's work. Blazon, Inc. v. Deluxe Game Corp., 268 F.Supp. 416, 422 (S.D.N.Y. 1965); Stratchborneo v. ARC Music Corp., 357 F.Supp. 1393 (S.D.N.Y. 1973). See, 2 M. Nimmer, Copyright §142.1 (1974).

The testimony of Enco's witnesses in this case revealed even more than a "reasonable opportunity" to view Arrow's bowl. Daniel Steinberg, Enco's Vice President of Sales and one of those involved in the decision to market a New York

City tray, testified that he had seen competitors' products in retail stores during the past twelve years. The trial court concluded from the evidence that it was "inconceivable" that Mr. Steinberg had never seen Arrow's tray. And since Mr. Steinberg was directly involved in the Japanese reproduction of the tray, there is a direct link between Enco's access and the copying of Arrow's tray.

Finally, the communication to one of Enco's salesmen as early as 1971 of the fact that Multi-Products was already manufacturing a New York City tray for Arrow provides further evidence of Enco's knowledge of Arrow's product. */

C. There Was Substantial Evidence That Enco's Tray Copied The Tangible Expression of The Idea in Arrow's Tray

The trial court, in analyzing the testimony of Enco's witness that the origin of the idea for a New York City tray came from a Las Vegas tray, concluded, at 17a:

> "While the idea of such a tray could have been derived from the Las Vegas tray, the specific and tangible expression of that idea, embodied in defendant's tray, could not have. See Uneeda Doll Co., Inc. v. P.&M. Doll Co., Inc., 353 F.2d 788 (2d Cir. 1965)."

*/ Enco argues on appeal that the trial court erred in permitting the admission made by an Enco salesman to be introduced into evidence. This contention is disposed of infra, at 16 - 17.

The court below was obviously referring to the substantial similarities and other evidence that outweighed Enco's defense of independent creation. Defendant on appeal, relying on Uneeda Doll, supra, now appears to argue that because both Arrow's tray and Enco's tray depict scenes of New York City, this Court should reverse the finding of the trial court. Certainly, this is a misreading of Uneeda Doll. In that case, this Court held only that there was no reason to reverse the district judge's finding that the defendant's doll copied the "abstract idea" of a doll on a pole and not the "tangible expression" of the idea of a doll on a pole. 353 F.2d at 789. In the instant case, the district court clearly found, to the contrary, that defendant's tray does not merely copy the idea of a tray depicting a city's landmarks, but rather copies the specific and unique features of a tray expressing that idea about New York City.

D. There Was No Evidence to Dispel the Inference That Enco Copied Arrow's Tray

Enco has failed to refute the inference of infringement raised by Arrow's proof of the striking similarity between the trays and Enco's access to the trays, since Enco has nowhere presented credible evidence of independent creation.

Enco witnesses testified extensively as to the independent development of Enco's New York City tray after Mr. Steinberg saw a souvenir tray depicting scenes of Las Vegas. After listening to all witnesses, the trial court characterized Mr. Steinberg's testimony as being inconceivable (16a), and Enco's contention of independent creation "rot credible" and "unbelievable" (16a, 17a). It is well established that the question of the credibility of the testimony of witnesses in a copyright infringement action is an issue to be determined by the trial judge. Smith v. Little, Brown & Company, supra. This is an area well left to the judgment of the trier of fact who is aware of the demeanor and credibility of the witness. Therefore, the trial court was entirely justified in rejecting the testimony of Enco's witnesses and finding no evidence of independent creation.

The only real issue and the only one raised by defendant is whether the district court based its finding of infringement on substantial evidence of access and similarity between the trays of Arrow and Enco. Since the evidence on this issue is more than sufficient to support the trial court's finding and conclusions, the decision below should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN ADMITTING ARROW'S NEW YORK CITY TRAY INTO EVIDENCE AS PROOF OF ENCO'S INFRINGEMENT OF COPYRIGHT NO. Gp23714

At trial, Enco attempted to bar admission of Arrow's New York City tray (PX-2) into evidence on the ground that there was no proof that the proffered tray was covered by the certificate. (PX-1) The trial court denied the notion on the basis that the information contained in the certificate, specifically the dimensions and weight of the tray, coincided with the dimensions and weight of PX-2. In addition to the conformity between the tray and the certificate, which, under 17 U.S.C. §209, is to be taken as prima facie evidence of the facts stated therein, PX-2 bears on its back plaintiff's trademark, name, and the copy ight symbol. These markings identify the tray as Arrow's copyrighted New York City tray.

Moreover, Arrow presented testimony that PX-2 was the same tray that had been deposited with the copyright office. Isidore Brown, President of Arrow, testified that Arrow's New York City tray had not been changed since the date of registration. (24a) Mr. John Passela, an employee with Arrow for 50 years, and a department head between 1955 and 1960 testified that Arrow had not marketed another New York City tray since 1955. (68a) Mr. Passela stated that "ever since we started with it [PX-2] that mold has been the same, we haven't changed the design" (69a) While

Mr. Litzenberger, who had actually designed and mailed the trays for Arrow had passed away, Mr. Passela had worked for Mr. Litzenberger on the design and was certain that PX-2 was the only possible tray that could have been registered. There is no refutation of Mr. Passela's testimony on this point.

Therefore, the trial court was not in error when it admitted Arrow's New York City tray into evidence.

III. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING CERTAIN STATEMENTS OF FORMER EMPLOYEE OF ENCO

The statements of Enco's former employee, Mr. Slabodsky, were properly admitted into evidence by the trial court. Mr. Slabodsky's declaration to Mr. Stevens of Multi-Products, Inc. was offered not for its truth but specifically to show knowledge on the part of Enco as early as 1971 that Arrow was marketing a New York City tray. (62a, 63a) Such an out of court statement, as the trial court recognized, is not hearsay but a well accepted exception to the hearsay rule. McCormick on Evidence, §249 (2d Ed. 1972)

Mr. Slabodsky's statements to Mr. Brown in 1973 concerning Enco's efforts to "knock off" the Enco bowl

were properly admitted under an exception to the hearsay rule for admissions. Mr. Slabodsky was at the time his conversation took place with Mr. Brown of Arrow in 1973 the New York City Salesman for Enco. In that capacity he told Mr. Brown of his efforts in the past on behalf of Enco to have Arrow's tray copied.

The statements of any agent including an employee, are admissable as the admissions of the principal when the agent speaks within the scope of his authority. See, McCormick on Evidence §267 (2d Ed. 1972). Unlike the situation in Maggio v. Mid-Hudson Chevrolet, Inc., 34 A.D. 2d 567, 310 N.Y.S. 2d. 40 (2d Dept. 1970), cited by plaintiff, where there was no proof at trial of the type of scope of the employee's duties, the authority and responsibility of the agent here has been shown.

Even assuming that none of Mr. Slabodsky's statements are admissable, the trial court's error did not prejudice Enco. The trial court had more than ample grounds for rejecting Enco's claims of independent creation without these statements. The trier of fact is entitled to find that Enco's witnesses were not credible.

Therefore, there is no basis for reversing the trial court because of the admission into evidence of Mr. Slabodsky's declarations.

CONCLUSION

For the foregoing reasons, appellee urges this Court to affirm the judgment of the court below.

Respectfully submitted,

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